COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0766

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

COUNTY OF GREEN LAKE,

PLAINTIFF-RESPONDENT,

v.

JOHN D. PEARSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Affirmed.*

NETTESHEIM, J. The issue on appeal is whether a defendant seeking to reopen a forfeiture judgment pursuant to § 345.36(2)(b), STATS., must demonstrate a meritorious defense in addition to "mistake, inadvertence, surprise or excusable neglect …." We hold that the trial court correctly ruled that a meritorious defense must be established to support a motion to reopen under the statute. We therefore affirm the court's order denying John D. Pearson's motion

to reopen a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI).

The facts relevant to the appellate issue are not in dispute. Pearson was arrested for OWI on February 9, 1998. He hired an attorney. In the course of the proceedings, the attorney sought and received the trial court's approval to withdraw as Pearson's attorney. Thereafter, Pearson failed to appear at a pretrial conference. Based upon this nonappearance, the court entered a default finding of guilt pursuant to § 345.36(2)(b), STATS., and the court scheduled the matter for a penalty hearing. Pearson also failed to appear at the penalty hearing. The court imposed appropriate penalties and ordered a default judgment against Pearson.

Upon receiving notice of the judgment, Pearson immediately hand delivered a letter to the clerk of court asking that the matter be reopened. Pearson also hired new counsel who filed a separate motion to reopen. At the conclusion of the motion hearing, the trial court determined that Pearson had not established excusable neglect *or* a meritorious defense to the OWI charge. Later, the court denied Pearson's motion for reconsideration of this ruling. Pearson appeals.

On appeal, Pearson challenges both the trial court's finding that he had not established excusable neglect and the court's further determination that he had not established a meritorious defense. Because we uphold the trial court's ruling that Pearson did not establish a meritorious defense, we need not address his challenge to the court's finding that he did not establish excusable neglect. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Pearson does not contend that he established a meritorious defense. Rather, he contends that he is not required to do so. He bases this argument upon the following language of § 345.36(2)(b), STATS.:

> If the defendant moves to open the judgment within 20 days after the date set for trial, and shows to the satisfaction of the court that the failure to appear was due to mistake, inadvertence, surprise or excusable neglect, the court shall open the judgment, reinstate the not guilty plea and set a new trial date.

Pearson correctly notes that this language does not expressly require that a motion to reopen recite a meritorious defense.[1]

The County of Green Lake responds that motions to reopen under the "[m]istake, inadvertence, surprise, or excusable neglect" provision of § 806.07(1)(a), STATS., require a concomitant showing of a meritorious defense. *See* ***J.L. Phillips & Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis.2d 348, 354-58, 577 N.W.2d 13, 16-17 (1998). In ***J.L. Phillips***, the supreme court ruled that a meritorious defense showing must be made even though the statute did not recite such a requirement. *See* ***id***.[2] The court so construed the statute in this manner despite the fact that the prior statute expressly required a responsive pleading "disclosing a defense." *See* ***id***. at 355-56, 577 N.W.2d at 16-17.

We see no reason to construe § 345.36(2)(b), STATS., differently. An OWI forfeiture prosecution is a civil proceeding. *See* ***State v. Schulz***, 100 Wis.2d 329, 331, 302 N.W.2d 59, 60-61 (Ct. App. 1981). The rules of civil procedure apply to forfeiture actions. *See* ***State v. Joerns Furniture Co., Inc.,*** 114

[1] We reject the County's argument that Pearson's appellate argument should be analyzed under § 806.07, STATS., because Pearson's motion cited to this statute. Despite this "mislabeling," the applicable statute is § 345.36(2)(b), STATS. And, since we construe the two statutes as virtually equivalent, Pearson's "mislabeling" is of no consequence.

[2] We appreciate that the supreme court's interpretation of § 806.07, STATS., in ***J.L. Phillips & Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis.2d 348, 356-57, 577 N.W.2d 13, 17 (1998), was based, in part, on the statute's outgrowth from the Federal Rules of Civil Procedure whereas § 345.36, STATS., is not a product of the Federal Rules. That does not change our thinking on the issue because, the Wisconsin Rules of Civil Procedure apply in civil actions. *See* ***State v. Joerns Furniture Co., Inc.***, 114 Wis.2d 324, 327, 338 N.W.2d 331, 332 (Ct. App. 1983).

Wis.2d 324, 327, 338 N.W.2d 331, 332 (Ct. App. 1983). Both § 345.36(2)(b) and § 806.07(1)(a), STATS., recognize "mistake, inadvertence, surprise or excusable neglect" as grounds for reopening a judgment. The only difference is that with § 345.36(2)(b), the trial court "shall" reopen the judgment if the requisite showing is made, whereas with § 806.07, STATS., the court "may" reopen the judgment if the requisite showing is made. But this difference in language does not speak to what the movant must show in support of the request to reopen. Rather, it speaks to what the trial court may or must do in response to the showing.

We affirm the trial court's ruling that Pearson was obligated to demonstrate a meritorious defense in support of his motion to reopen the OWI judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.